IN THE

Supreme Court of the United States.

No. 129.

THE BUFFALO AND JAMESTOWN RAILROAD CO.,

PLAINTIFFS IN ERROR,

vs.

WALTER J. WEEKS AND OTHERS,

DEFENDANTS IN ERROR.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR.

CLARKSON N. POTTER,

Of Counsel,

The Supreme Court

OF THE UNITED STATES.

THE BUFFALO & JAMESTOWN RAILROAD COMPANY,
Plaintiffs in Error,

vs.

WALTER J. WEEKS, and others,
Commissioners, etc.,
Defendants in Error.

Error to the Court of Appeals of the State of New York.

Brief on behalf of Defendants in Error.

This is an appeal from a final judgment of the Court of Appeals of the State of New York, affirming a judgment of the Supreme Court of that State, made upon an agreed case between the parties.

The Plaintiff is a corporation formed under the General Rail Road Law of the State of New York, to construct and operate a railroad in that State.

The Defendants are Commissioners of the Town of Ellicott (Chatauqua Co., N. Y.), appointed by the County Judge of that County, in pursuance of the laws of that State, to issue bonds for the Town.

In 1869 (Chap. 907, Laws 1869, Vol. 2, p. 2303) the laws of New York authorized the County Judge, upon the application of a majority of the taxpayers of the Town, to appoint Commissioners to make bonds of the

Town (§ 1), and invest the same in the stock of any railway in the State.

The law further (§ 5) "empowered and directed such Commissioners, when appointed, to subscribe in the name of" the Town to the stock of the Railway Company, and pay for the same either by the bonds of the town or by the proceeds of the bonds, sold at not less than par, in their discretion.

In 1870 a law was passed (Ch. 507, Laws of 1870, Vol. 2, p. 1148) authorizing the Commissioners to enter into an agreement with the corporation, limiting and defining the time when, and the proportions in which the bonds should be delivered to the corporation, and the places where, and purposes for which the bonds or their proceeds should be applied.

In 1871 a further law was passed (Ch. 925, Vol. 2, p. 2115) providing that the petition of the tax-payers, authorized by the Act of 1869, might be absolute or *conditional*—if conditional, the acceptance of the condition, or of a subscription in pursuance of it, should bind the Railroad Company.

This law also provided (§ 5) for an amendment to the Act of 1870, by adding thereto a section enacting that, in case the Commissioners and the Railroad Company could not agree as provided in that act, the Supreme Court might determine as to the terms and conditions on which the bonds should be delivered.

In 1872, a majority of the tax-payers of the Town of Ellicott made application for the issue of $200,000 of the bonds of the town, and for the investment of the same or the proceeds thereof in the stock of the Plaintiff's Company, conditioned upon the location and construction of the Railway through the Village of Jamestown, in the Town of Ellicott, *before the bonds were delivered to the Company, or sold.* And the Court appointed Commissioners to issue the bonds accordingly.

In June, 1872, the Commissioners entered into an agreement—not only as to the matters contained in the

Act of 1870, *i. e.*, as to the time when and the proportions in which the bonds should be delivered, but also agreed that, when the Railway was built, they would subscribe for $200,000 of stock, and pay for it with these bonds.

In August, 1874, the Commissioners caused the Bonds to be prepared and executed, and at the request of the railroad company, delivered the same to the defendants Robert Newland and Augustus F. Allen, [since dead] and took from them a receipt reciting the agreement between the Commissioners and the Railroad Company; and providing, that if the Railway Company before the 1st of January, 1876, constructed and completed its railway through the villiage of Ellicott, then, upon the Commissioners having subcribed for $200,000 of stock and received the certificates therefor, they were to deliver the Bonds to the Company, in payment of such subscription.

These bonds still remain in the posession of the defendant Newland.

On January 1st, 1875, the Constitution of the State of New York was amended, so as to forbid any investment by the town in any railroad company. *No part of the line of the Railway through the village of Jamestown was then constructed or commenced.*

In October, 1875, the Railroad Company built its line through the village of Jamestown, and applied to the Commissioners to subscribe to its stock and deliver to it the Town Bonds. The Defendants refused to do so, but agreed, under the New York Statute, with the Railway Company upon a case to determine the right of the Railway Company to the Bonds. In that case the Supreme Court gave Judgment against the Company, holding the defendants had no right to subscribe for its stock, and that the Company was not entitled to the Bonds of the Town.

In the meantime an action had been brought by certain tax-payers to restrain the delivery of the Bonds to the Railroad Company. In that action the Defendants in this case, as well as the Railroad Company, were made

defendants, and judgment restraining them was given in the Supreme Court, and an appeal was affirmed by that Court in Banc. *From this judgment no appeal was taken by these Defendants.* But the Railway Company appealed from that judgment, as well as from the judgment of that Court in this case, which judgments were later affirmed by the Court of Appeals; from which Court of last resort the Railroad Company has appealed here in both cases. The appeal from the judgment in this case being No. 129 and in the action for an injunction being No. 89.

POINTS.

The Town and its Commissioners existed only by force of law, and had no authority whatever to make bonds or subscribe for stock, except that given by Statute.

The Railway Company was also the creature of the law, and had no powers, except those given it by Statute; and the Constitution of the State had expressly reserved for the Legislature the power to alter and repeal such Statutes. (Const. N. Y. Art. VIII.)

Unless, therefore, there was a sub[illegible]ontract, the obligation of which required the Town for a sufficient consideration, to take the stock in the Railroad Company and pay for it with their Bonds, the Plaintiffs cannot recover.

First Point.—The Commissioners of the Town of Ellicott were, by the terms of their appointment, prohibited from subscribing to the plaintiff's stock until the railway was completed.

The order appointing the Commissioners, declares that they were "*appointed Commissioners for the purposes mentioned in the tax payers' petition.*"

The condition imposed by the tax-payers, therefore, expressly limited the power of these Commissioners.

Now, the true meaning of the tax-payers' condition, was, that there should be no subscription for stock until the railway was completed. Its language is:

"And your petitioners desire that the said town of Ellicott, shall create "and issue its bonds to the amount of two hundred thousand dollars, "and *invest the same* or the proceeds thereof, in the stock of the Buffalo "& Jamestown Railroad Company, upon the conditions that the line of "the railroad of said Company to be constructed from the city of "Buffalo to the line of the State of Pennsylvania, in said county, shall "be located and constructed through the village of Jamestown, in said "town of Ellicott, *before said bonds shall be delivered to said Company "or sold.*

This language the Court of New York has construed as meaning not only that no payment, but that no subscription should be made in advance of the completion of the railway.

Falconer *v.* Buffalo & C. R. R. Co., 69 N. Y. 491.
Ibid. 7 Hun., 499.

If this construction by the highest Court of New York, of the effect of the statutes of that State, should not be regarded by this Court as controlling, it is at least entitled to the highest weight. And it is a construction warranted by the language used and the circumstances.

There could be no investment in the stock of the Railway Company until the Bonds were delivered or sold; for it was only by the Bonds or by the proceeds of the Bonds, that the stock of the Company was to be or could be paid for. And since these Bonds could not be delivered nor sold until the road was completed, it was not until the road was completed that the investment could be made. There was, therefore, no authority upon the part of the tax-payers to engage the town in advance of the completion of the road.

And that such a limitation was intended is the more evident, because of the provision of the General Railroad Act, (II R. S., 522, § 11,) by which every stockholder of this Company is made liable to the creditors of the Company, for an amount equal to the amount unpaid upon his stock, with a further liability for all debts due by the Company to its laborers and servants.

It would have been in the highest degree improvident in these tax-payers, to have incurred by a subscription to these shares before the road was completed, a liability which, if the road had never been finished, might have obliged the town to pay a sum equal to the amount of the subscription without any possible advantage to the town.

If this construction of the tax-payer's condition be correct, then, since this power of the Commissioners to subscribe was revoked *before* the Railway Company began the construction of its work, the Company could thereafter have no right to insist upon the subscription.

Aspinwall *v.* Com. Davies Co., 2 Howard, 377
Concord *v.* Portsmouth Bank, 92 U. S., 625.

But if this were otherwise, and if the condition in the petition only restricted payment for the stock until the line was completed, but not the subscription for it, it still remains, that since the power to subscribe was revoked before any subscription was made, and before Paintiff commenced its road plaintiff has no right to recover.

Second Point.—The Railroad Company acquired no right to a subscription by the appointment of the Commissioners.

The Statute indeed gave the Town the right to invest in, and directed the Commissioners to subscribe for the Plaintiff's Stock, but that of itself gave the Railroad Company no right to insist upon such subscription.

Had the Commissioners, after their appointment refused to subscribe, they could not have been compelled to do so by any one but the Town or one of its taxpayers.

Clearly if A directed B to subscribe in his name for shares in a Company and B neglected or refused to do so, the Company would have no right to compel B to subscribe. And if at any time before actual subscription A revoked the power, B could no longer act under it.

Even where A sent money to B, to be paid to C, to whom A owed this money, it was held, C could not recover the money without A's assent, and that at any time, before actual payment, A could recall the money, and C could not prevent this.

Williams *v.* Evart, 14 East
Hodgson *v.* Anderson, 3 Burn & Cress., 842,
Leonard *v.* Whitney, 24 Wend, 262.

That the Defendants represent a Municipal Corporation, instead of a natural person, cannot add to their authority, nor to the Plaintiff's rights.

Covington & Lex R. R. Co. *v.* Kenton Co., 12 B. Monroe, 144,
Aspinwall *v.* Davis Co., 22 Howard, 377.

Third Point.—Neither do the Act of 1870, and the agreement made by the Commissioners with the Company by virtue thereof, give the Company a right to recover.

The law of 1869 directed the Commissioners to subscribe for shares, but gave them no powers to ffx conditions upon such subscription, nor in any way to protect the interests of the Town. This the amendment of 1870 authorized the Commissioners to do, so far as to "limit and define the times and proportions in which the bonds should be delivered, and the places and purposes to they should be applied.

But the agreement made provided nothing as to the places and purposes to which the bonds should be applied; and as to the times and proportions in which they were to be delivered, provided that they were to be delivered only upon the completion of the Railroad. But this condition had already been prescribed by the taxpayers themselves. When the law authorized the taxpayers to impose conditions, the conditions imposed by them were necessarily controlling. Thereafter, the Commissioners could only impose additional conditions. They could neither change nor lessen the condition imposed by the tax-paers. In insisting upon the condition imposed by the taxpayers, the Commissioners imposed no new obligation upon the Railway Company, and secured from the Company by this agreement no advantage to the Town. It will be observed that the Company made no promise to construct the road through the village, and that the Commissioners took care to recite that they claimed no authority except that given by Statute. Indeed, by this agreement the Railroad Company was bound to do nothing which it was not previously bound to do; and nothing was fixed by it, in respect of the time and proportions in which the bonds should be delivered, which had not been already fixed by the taxpayers themselves.

The agreement did, indeed, provide that, when the line was completed, the taxpayers should subscribe for stock, and the Railway Company take bonds for the subscription. But the Act of 1870 provided for no such agreement. It was a Statute authorizing conditions; not enlarging powers. So far, therefore, as this agree-

ment was authorized, it was not material; and, so far as it may be material, it was not authorized.

Fourth Point.—But if the Commissioners were, by the terms of their appointment, authorized to subscribe at any time after their appointment for the Plaintiff's Stock, such a general authority did not warrant an executory agreement to subscribe at a future time.

I am aware that your honor in the case of Moultrie *v.* Savings Bank, 92 U. S., 632, say that a power to subscribe embraced a power to agree to subscribe preparatory to an actual subscription.

We concede that case was correctly decided. There the Supervisors of the Town had resolved upon a present subscription, which was the only form by which they could subscribe. Nay, more, they treated and announced such resolution as being, not their declaration of an intention to subscribe, but an actual subscription, and were, therefore, estopped from claiming that it was not such.

Undoubtedly, if I authorize my agent to pay a fixed sum for a certain work when it is performed, he is entitled to invite the performance of the work, and when performed, I become liable to the party performing for the sum to be paid. But until the performance is commenced, I can revoke the invitation.

When, therefore, your Honors said that a power to subscribe, payable upon construction, embraced a power to agree to subscribe, I take it that your Honors only meant embraced a power to invite construction upon those terms; which payment upon performance became obligatory on the Town.

Fifth Point.—But if it be considered that such an agreement were authorized, it none the less remains that it was rescinded before the work was commenced and that thereafter, if the Plaintiff was entitled to recover damages for the non-performance, it was still not entitled to have a specific performance of the contract.

If I offer A a dollar to cut my grass to-morrow and he accept the offer, and I subsequently notify him not to go on with the work, he is not, thereafter, entitled to insist upon performing it, nor upon recovering the contract price, but is only entitled to such damages as he may have been subjected to.

Shannon *v.* Comstock, 21 Wend, 457,
Hecksher *v.* McCrea, 24 Wend, 303,
Clark *v.* Marsilgia, 1 Denio, 317,
Gordon *v.* Kirke, 2 Hilton, 401,
Hosmer *v.* Wilson, 6 Mich., 294,
1 Sedgewick on Damages, 210—212.

And the amendmendment to the Constitution was notice that this contract for subscription was terminated.

It may well be that in an action upon this agreement, the Town would show that although the road was constructed through the village, it was constructed through but such a small part of it as substantially to defeat the object intended by the Town, and promised by the Railroad Company; so that the Town might be entitled in equity to recoup its damages in that regard, or such as it might have suffered by reason of the bankruptcy of the Railroad Company through mismanagement, or otherwise.

So that, if your Honors think the Court of New York were wrong in respect of the power of the Commissioners, and can see that they were entitled to enter into an executory agreement with the Company, none the less it does not follow that the Railroad Company is entitled to the Bonds in question.

Sixth Point.—Finally, the Statutes of New York, being by the fundamental law subject to revocation, of which all citizens had notice, the agreement of the Commissioners to subscribe when the road was completed, if otherwise valid, fell with the amendment to the Constitution, the construction of the road not having then been commenced.

The Constitutional provision as to laws impairing the obligations of contracts, was not intended to prevent the States from controlling the action of their municipal bodies and officers.

Aspinwall *v.* Com. of Davies Co., 22 Howard, 377–8.

CLARKSON N. POTTER,
of Counsel for defendants in error.

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